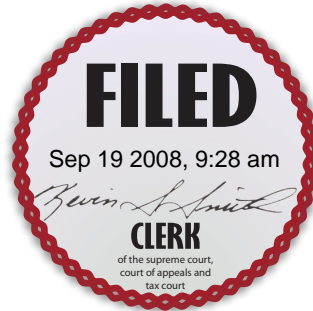


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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KEVIN R. SCHULTZ,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 66A03-0804-CV-168
	)	
JANEL R. (SCHULTZ) MARSH,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE PULASKI SUPERIOR COURT  
The Honorable Jeanene Calabrese, Special Judge  
Cause No. 66D01-0201-DR-2

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**September 19, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Appellant-Petitioner Kevin Schultz appeals the order denying his motions to prevent relocation and to modify custody regarding Appellee-Respondent Janel Marsh's intention to move with their children to Texas. We affirm.

## Issues

Schultz raises three issues on appeal, which we consolidate and restate as:

- I. Whether Marsh's Notice of Intention to Relocate was properly before the trial court due to Marsh's failure to comply with the Relocation Statute; and
- II. Whether the trial court abused its discretion in denying Schultz's motions to prevent relocation and modify custody.

## Facts and Procedural History<sup>1</sup>

The marriage of Schultz and Marsh was dissolved on July 11, 2002. Pursuant to the settlement agreement, the parties had joint legal custody of their two girls, and Marsh had physical custody with Schultz having parenting time.

In 2005, Marsh remarried. Due to her husband's military assignment to Fort Hood, Texas, Marsh provided Schultz's counsel with a "Notice of Intent to Relocate" in October 2007. The Notice provided in part:

1. That a new address has not yet obtained, however, the residence will be in the Fort Hood, Texas area.
2. That no relocation date has been set, however the Respondent intends to move mid to

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<sup>1</sup> We note that some items in the Appellant's Appendix are unnecessarily repetitive. First, contrary to Indiana Appellate Rule 50 (A)(2), Schultz's counsel included the entire 250-page transcript in the appendix. Only those *brief portions* of the transcript containing the rationale of the decision or that are important to a consideration of the issues should be duplicated and included in the appendix. See Ind. Appellate Rule 50(A)(2)(d) and (g).

As required by Rule 50(A)(2)(a), Schultz's counsel included the chronological case summary (CCS). However, he also included seven "Chronological Case Summary" sheets in the appendix. This is unnecessary as this information is already contained in the CCS.

late October, 2007.

....

6. That because specific information is not included herein, the Respondent will supplement this Notice as new information becomes available.

Appellant's Appendix at 426-27. The chronological case summary does not reflect the submission of the Notice to the trial court.

On October 5, 2007, Schultz filed a Motion for Change of Judge, Verified Motion for Temporary Restraining Order, Verified Motion to Modify Custody, Motion to Prevent Relocation, and Motion for Custodial Evaluation. The change of judge was permitted pursuant to the parties stipulating to the appointment of a special judge. After a hearing on the Verified Motion for Temporary Restraining Order, the trial court ordered Marsh to remain in Indiana with the two children until the pending motions were resolved.

After several days of hearings on the remaining motions, the trial court issued its Findings of Fact, Conclusions of Law and Order on March 19, 2008. The trial court concluded that the parties had complied with Indiana Code Chapter 31-17-2.2, governing the relocation of a custodial parent with minor children. It also concluded that Marsh's reasons for relocation were legitimate and made in good faith, shifting the burden to Schultz to prove that the relocation is not in the best interests of the children. Finally, the trial court concluded that Schultz had not met that burden and denied Schultz's outstanding motions. Accordingly, the trial court also granted Marsh's request to relocate the children to Fort Hood, Texas. Additional facts will be provided as needed.

This appeal ensued.

## **Discussion and Decision**

### Standard of Review

The trial court entered findings of fact and conclusions of law at the request of both parties. Pursuant to Indiana Trial Rule 52(A), our standard of review is to determine whether the evidence supports the findings and then whether the findings support the conclusion. As the trial court is charged with determining the credibility of the witnesses, we will “not set aside the findings or judgment unless clearly erroneous.” Ind. Trial Rule 52(A). Clear error exists where the record does not offer facts or inferences to support the trial court’s findings or conclusions of law. Rogers v. Rogers, 876 N.E.2d 1121, 1126 (Ind. Ct. App. 2007), trans. denied.

Appellate courts give considerable deference to the findings of the trial court in family matters. MacLafferty v. MacLafferty, 829 N.E.2d 938, 940 (Ind. 2005). Whether the appropriate standard of review is abuse of discretion or clear error, “this deference is a reflection, first and foremost, that the trial judge is in the best position to judge the facts, to get a feel for the family dynamics, to get a sense of the parents and their relationship with their children - the kind of qualities that appellate courts would be in a difficult position to assess.” Id. Additionally, appellate decisions that change the results below are especially disruptive in the family law setting. Id. Finally, “the particularly high degree of discretion afforded trial courts in the family law setting is likely also attributable in part to the ‘fluid’ standards for deciding issues in family law cases that prevailed for many years.” Id. at 940-41.

### I. Compliance with Relocation Statute

First, Schultz asks this Court to reverse the trial court's order on the basis that Marsh did not comply with the requirements of the Relocation Statute codified in Indiana Code Chapter 31-17-2.2.<sup>2</sup> For the circumstances of this case, Section 1(a) of this statute states that "[a] relocating individual must file a notice of the intent to move with the clerk of the court that issued the custody order or parenting time order and send a copy of the notice to any nonrelocating individual." We understand Schultz's argument as demanding the reversal of the grant of Marsh's request to relocate due to Marsh's failure to file her notice of intent to move with the trial court. However, Schultz does not articulate the exact remedy he seeks: dismissal or the grant of his motion to prevent the relocation. Dismissal would be a waste of personal and judicial resources as Marsh would refile and the subsequent hearing would involve the same evidence and issues. To reverse the trial court and grant Schultz's motion to prevent the relocation would be elevating form over substance. There are areas of the law and circumstances when form or procedure is dispositive. However, family law, especially where the paramount consideration is the best interests of a child, is generally not an area where form should trump substance.

Although we agree with Schultz that the proper procedure requires the relocating individual to file the notice with the trial court, we conclude that the issue of Marsh's intent to move and its potential effects on the children and Schultz was presented to and addressed by the trial court. Schultz accomplished this by filing his motions for a temporary restraining

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<sup>2</sup> Schultz characterizes this as an issue of jurisdiction. "Attorneys and judges alike frequently characterize a claim of procedural error as one of jurisdictional dimension." K.S. v. State, 849 N.E.2d 538, 541 (Ind. 2006). Such is the case here. Marsh's failure to submit her Notice of Intent to Relocate to the trial court does not affect the trial court's subject-matter jurisdiction. Rather, it is a question of whether the proper procedure was

order and to prevent the relocation. Furthermore, Marsh provided the notice to Schultz's counsel. Informing the nonrelocating individual of the other individual's intent to relocate the child is the essential purpose of the statute. This was accomplished and provided Schultz the opportunity to object and present relevant evidence.

Seeking the remedy of the denial of Marsh's request to relocate, Schultz also takes issue with Marsh's failure to comply with the notice requirements of Section 3 of the Relocation Statute. Section 3 provides that the individual required to file a notice must:

- (1) send the notice to each nonrelocating individual:
  - (A) by registered or certified mail; and
  - (B) not later than ninety (90) days before the date that the relocating individual intends to move; and
- (2) provide the following information in the notice:
  - (A) The intended new residence, including the:
    - (i) address; and
    - (ii) mailing address of the relocating individual, if the mailing address is different than the address under item (i).
  - (B) The home telephone number of the new residence.
  - (C) Any other applicable telephone number for the relocating individual.
  - (D) The date that the relocating individual intends to move.
  - (E) A brief statement of the specific reasons for the proposed relocation of the child.
  - (F) A proposal for a revised schedule of parenting time or grandparent visitation with the child.
  - (G) A statement that a parent must file an objection to the relocation of the child with the court not later than sixty (60) days after receipt of the notice.
  - (H) A statement that a nonrelocating individual may file a petition to modify a custody order, parenting time order, grandparent visitation order, or child support order.

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utilized to place before the trial court the issue of Marsh's request to relocate.

Marsh does not dispute that her notice was not sent by certified or registered mail, nor at least 90 days prior to the intended relocation. The notice also did not contain the new intended address or phone number.

The Relocation Statute specifies the remedy when a notice is deficient. “If a nonrelocating parent files a motion [to prevent relocation], the court . . . may grant a temporary order restraining the relocation of a child . . . if the court finds: (1) that the notice required . . . under this chapter was not served in a timely manner and the parties have not presented an agreement concerning a parenting time schedule.” Ind. Code § 31-17-2.2-6. Schultz sought and obtained such relief. This restraining order prevented the relocation until the conclusion of a full hearing on the merits and required Marsh to provide the intended address and telephone information. Furthermore, Schultz admitted that Marsh had informed him in April or May of 2007 of the potential move due to her husband reenlisting in the Army. Schultz availed himself of the remedy provided in Indiana Code Section 31-17-2-6 for an insufficient notice of relocation. Therefore, he was not prejudiced by Marsh’s failure to comply with the notice provision in question.

## II. Relocation of the Children

There are two ways an individual can object to a proposed relocation: a motion to modify a custody order or a motion to prevent relocation of the child. See Ind. Code §§ 31-17-2.2-1(b) and 31-17-2.2.5(a); Baxendale v. Raich, 878 N.E.2d 1252, 1256 n.5 (Ind. 2008). Here, Schultz filed one of each. Whether we review the trial court’s ruling based on the motion to modify or Schultz’s motion to prevent relocation, both analyses turn on “the best interests of the children.” See Baxendale, 878 N.E.2d at 1256 n.5. When a parent wishes to

relocate a child, she must first establish that the relocation is made in good faith and for a legitimate reason. Rogers, 876 N.E.2d at 1128. If this burden is satisfied, the burden shifts to the non-relocating parent to show that the proposed relocation is not in the best interests of the child. Id. Schultz does not contest that Marsh has a legitimate reason for the relocation. Therefore, our inquiry is whether the evidence supports the trial court's findings and conclusions that the proposed relocation is in the best interests of the children.

In its determination of whether to prevent the relocation of a child, the trial court shall take into account:

- (1) The distance involved in the proposed change of residence.
- (2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.
- (3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.
- (4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual's contact with the child.
- (5) The reasons provided by the:
  - (A) relocating individual for seeking relocation; and
  - (B) nonrelocating parent for opposing the relocation of the child.
- (6) Other factors affecting the best interest of the child.

Ind. Code § 31-17-2.2-1(b).

Schultz structures his argument by challenging only a handful of the thirty-nine findings. He claims that each challenged finding is not supported by evidence in the record. As stated above, we give considerable deference to the findings of the trial court in family matters. First, Schultz challenges findings 12 and 13, which state that it would be detrimental to the children if they were separated from Marsh or their stepbrother. There is



evidence supporting these findings in the testimony of Marsh, Christopher Marsh (Marsh's husband), and Peg Salkay (Salkay), a counselor to one of the children.

Finding 36 is also challenged. This finding provides in relevant part: "[Schultz] will not provide to the girls the secure and stable environment that they need for their emotional, social, mental and physical development that has been provided to them all of their lives by [Marsh]." Appendix at 408. Schultz does not have stable employment as he works at his father's bar without compensation, obtains a net income of ten to fifteen thousand dollars per year through an automobile trading business, and is waiting to be called by a local workers' union for a job offer. Schultz admitted that the potential union job was not guaranteed work, and even if hired, he would be traveling outside the district, which has a forty-five minute travel radius. At the time of the hearing, Schultz had federal criminal charges pending against him, which could result in his incarceration. Finally, Salkay testified that the older child expressed emotional frustration and sadness due to Schultz's lack of communication and broken promises to attend her activities. Salkay also testified that the child's comments regarding Schultz also indicate the possibility of role reversal, where the child is put in a position of having to meet the parent's emotional needs. Salkay opined that this would be an unhealthy situation as the child's need would remain unfulfilled. This evidence supports finding 36.

The testimony of Salkay also supports finding 37, which states: "If the girls relocate to Texas, their relationship with [Schultz] will not be affected because [he] has played a passive role in their lives, and has relied upon [Marsh] to be there for all of their needs." App. at 408. This passive role finding is also supported by Schultz's testimony that he could not

remember the last time he had attended one of the children's activities. Rather than seeking information to be able to attend such events, Schultz expected Marsh to inform him of the activities. Also instead of directly calling the girls, Schultz would text Marsh, instructing her to tell the girls to call him. When the girls did call, Schultz did not always answer because he was busy or with a customer.

Schultz claims that finding 34 is not supported by his testimony. Schultz testified in relevant part:

Q. Kevin, you heard us talk about [the older girl] and puberty issues.

A. Yes.

. . . .

Q. And how would you handle that if you got custody of this child?

A. I would probably deal with it with her mother. Like her mother said, if I had custody she would stay back here.

Q. So you're not prepared to deal with that?

A. Yes I'd deal with it.

Q. Personally?

A. Yes I would deal with it.

Trial transcript at 133. Finding 34 states that "[Schultz] wants [Marsh] to handle all issues regarding the girls' physical and mental development during puberty." App. at 407. Although possibly overstated, the finding is supported by Schultz's initial reaction that Marsh would be nearby to help with such issues if he obtained custody of the children. Apparently, the trial court did not believe Schultz's subsequent statements that he was

prepared to address this issue with the children on his own. The trial court is charged with making these types of credibility determinations, so we defer to this determination.

Finally, Schultz asserts that finding 38 is not supported by evidence. This finding states that:

The parties and children will be able to adapt to long distance parenting time pursuant to the Indiana guidelines, or to additional time as agreed upon by the parties. [Schultz] will be able to divert his business travels through Texas and establish business in Texas to see the girls more often than the minimum time established by the guidelines. [Schultz] and the girls can also have regular telephone contact.

App. at 408. Specifically, Schultz takes issue with the portion stating that he will be able to divert his business travels through Texas. When questioned about his travels for his automobile business, Schultz testified that he can buy and sell vehicles anywhere in the United States but his connections were currently in Florida. Upon further questioning, Schultz agreed that he could conduct his business in Texas after establishing a business relationship. The inference that, with diligent effort, Schultz would be able to redirect his business travels through Texas can be drawn from this testimony. Therefore, this evidence supports this finding of the trial court.

These findings, along with the remainder of the findings that Schultz did not challenge, support the trial court's conclusion that it is in the best interests of the children to relocate with Marsh to Texas. Marsh is the primary caregiver of the girls and has provided a stable and secure environment. Marsh and her husband play an active and key parental role in the lives of the girls. On the other hand, Schultz has not been active in communicating with the girls or attending their activities. Although Schultz did exercise parenting time, he

would frequently leave the girls in the care of a babysitter for extended hours while he worked at the bar at the Peak Inn. Furthermore, Schultz had pending federal criminal charges at the time of the hearing, which could result in time in prison. Finally, the girls' schoolteachers testified that they believed the girls would be able to adjust and adapt well after moving to Texas. Based on the circumstances of the children and the significant individuals in their lives, the findings support the trial court's conclusion that it is in the children's best interests to relocate to Texas. Therefore, the trial court did not abuse its discretion in denying Schultz's motions to modify custody and prevent relocation.

Affirmed.

RILEY, J., and BRADFORD, J., concur.